

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 957 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

STATE OF GUJARAT - Appellant
Versus

HIMAT DESABHAI DEVIPUJAK & 1 - Opponents

Appearance :

MRS FALGUNI PATEL, APP for Appellant.

MR VILAS G GOSWAMY for Opponents.

CORAM :	HONOURABLE MR.JUSTICE A.M.KAPADIA
	and
	HONOURABLE MR.JUSTICE K.A.PUJ

Date : 26/02/2007
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. The appellant - State of Gujarat has filed this appeal under Section 377 of the Code of Criminal Procedure ("the Code" for short) for enhancement of the sentence imposed by the judgment and order dated 07.04.2004 rendered in Sessions Case No. 05 of 2003 (74/2003) by the learned Additional Sessions Judge, 12th Fast Track Court, Gondal by which the respondents - accused Nos. 1 & 2 were convicted for commission of the offence punishable under Sections 395 & 397 of the Indian Penal Code ("IPC" for short) and sentenced to suffer RI for 07 years and fine of Rs.500/- and in default thereof, to undergo RI for 3 months for the offence punishable under Section 395 of IPC and RI for 7 years with fine of Rs. 500/- and in default thereof, to undergo RI for 3 months for the

offence punishable under Section 397 of the IPC. Both the substantive sentences were ordered to run concurrently.

2. Since the facts of the case have been detailed in the judgment of the learned Additional Sessions Judge, Gondal, it is not necessary for us to repeat the same all over again in verbatim and in detail in this judgment. However, the basic facts which are necessary to be discussed in this appeal are as under:-

3. That the complainant - Jatashankar Devgiri has lodged the FIR alleging inter alia that on 03.06.2001 at about 11.30 afternoon, when he was doing some work, some 4/5 persons arrived at the temple and asked for water and tea and the complainant served them water and tea. During the course of time, snake appeared near the temple and as a result of which witness Rasikbhai had killed that snake. After some time, 5 unknown persons suspected that some

other wild animals are in the vicinity and hence, witness Raskibhai proceeded towards the direction of tree with battery and lathi. 5 unknown persons also went behind Rasikbhai and they started beating Rasikbhai with lathi. As a result of which, Rasikbhai received injury on the head and five unknown persons also threw lathis towards the complainant and the witnesses, as a result of which all the persons were huddled in room nearby temple. These unknown persons have beaten up the complainant on the various parts of the body and after entering into the room as well as temple, looted away the cash amount of Rs.5000/- and other property. These unknown persons have also removed golden jewellery of witness, Naynaben who also received injuries. These five unknown persons were speaking Gujarati and Hindi language and they were aged about 25 to 30 years.

4. It is also the case of the prosecution that before coming to the temple, these unknown persons had

also attacked two motor-cyclists of the village and locked them up in a house nearby and had run away with their motor-cycle. It is also the case of the prosecution that Rasikbhai Purohit (PW 7) and Bhikhubhai Nathubhai (PW 2) ultimately escaped from the rear window of the temple and rushed in different directions to summon help from the village people. When the village people arrived, these unknown persons had run away with the loot.

5. An FIR with respect to the alleged incident was filed by the complainant against the accused for commission of the offence punishable under Section 395 & 397 of IPC at Gongal Taluka city police station. After registration of the complaint being I-C.R. No. 127/2001, investigation was put into motion. Panchnama of the scene of offence was drawn. Statement of the witnesses were recorded. As sufficient incriminating evidence was found against the accused for commission of the offence under Section 395 & 397 of IPC, a charge-sheet was

filed against the accused for commission of offence punishable under Section 395 & 397 of IPC in the Court of learned Judicial Magistrate First Class at Gondal.

6. As the offence under Section 395 & 397 of IPC is exclusively triable by the Court of Sessions, the learned JMFC, Gondal committed the case to the Additional Sessions Court, Gondal.

7. The learned Additional Sessions Judge, Gondal to whom the case was made over for trial, framed charge against the accused for commission of the offence punishable under Section 395 & 397 of IPC. The charge was read over and explained to the accused. As the accused pleaded not guilty to the charge, they were put to trial and tried by the learned Additional Sessions Judge, Gondal in Sessions Case No. 5 of 2003 (74/2003).

8. In order to bring home the charge levelled against the accused, the prosecution has, in all, examined as many as 25 witnesses, the details of which have been given in the impugned judgment and order and the same are as under :-

Sr. No.	Exh. No.	Particulars
01.	07	P.W. 1 - Mavjibhai Madhabhai
02.	09	P.W. 2 - Bhikhubhai Nathubhai
03.	10	P.W. 3 - Parbat Nanjibhai
04.	12	P.W. 4 - Harshadbhai Hargovindbhai
05.	14	P.W. 5 - Mayurbhai Bhikhubha Jadeja
06.	15	P.W. 6 - Babo @ Mahendra Balkrishna
07.	16	P.W. 7 - Rasikbhai Vithalbhai P.
08.	17	P.W. 8 - Dr. Mansukhbhai C. Gajera
09.	22	P.W. 9 - Virjibhai Jivabhai
10.	23	P.W. 10 - Ninaben W/o. Rasikbhai Purohit
11.	24	P.W. 11 - Dholiben W/o. Meghjibhai
12.	25	P.W. 12 - Chandubhai Vasrambhai
13.	27	P.W. 13 - Govindbhai Vitthalbhai
14.	29	P.W. 14 - Prakashbhai Mohanbhai
15.	37	P.W. 15 - Kantibhai Tapubhai
16.	38	P.W. 16 - Mukeshbhai H.
17.	39	P.W. 17 - Dr. Ujvalbhai C. Hathi
18.	44	P.W. 18 - Dr. Hemang H. Vasavada
19.	48	P.W. 19 - Ravjibhai Bhikhabhai
20.	49	P.W. 20 - Dr. Naimeshbhai C. Patel
21.	53	P.W. 21 - Jatshankar Devgiri
22.	57	P.W. 22 - Maganbhai F. Jadav
23.	59	P.W. 23 - Ramnikbharti Hemubharthi
24.	62	Allarakha Ismailbhai

Sr. No.	Exh. No.	Particulars
25.	65	Maheshkumar Dilipsinh

9. To prove the culpability of the accused, the prosecution has also produced number of documents and relied upon the contents of the same, details of which, enumerated in the impugned judgment and order, are as under :-

Sr. No.	Exh. No.	Type of Evidence
01.	08	Panchnama of scene of offence
02.	11	Panchnama of motorcycle taken
03.	13	Physical status Panchnama of witness Rasikbhai in Madhura Hospital.
04.	18	Injury Certificate issued to Rasikbhai Purohit by Gondal Govt. Hospital.
05.	19	Indoor case papers issued by Gondal Govt. Hospital of injured Rasikbhai.
06.	20	Treatment certificate issued by Gondal Govt. Hospital of injured Rasikbhai.
07.	20	Injury certificate issued by Gondal Govt. Hospital of injured Ravjibhai.
08.	26	Arrest Panchnama and physical status Panchnama of accused Madhyu desh vaghri.
09.	30	Police yadi regarding identification to the executive Magistrate.

Sr. No.	Exh. No.	Type of Evidence
10.	31	Panchnama of identification of accused Madhu Desha.
11.	32	Police yadi written for identification to the Executive Magistrate.
12.	33	Letter for identification of accused.
13.	34	Letter regarding to remain present the accused and who identify the accused by Executive Magistrate.
14.	35	Panchnama of identification of accused.
15.	36	Xerox copy of Yadi Exh. 33.
16.	40, 41	Indoor case papers and patrak regarding injured Virjibhai Nathabhai issued by Madhura Hospital.
17.	42	Certificate issued by Dr. Maru after examining Virji Natha.
18.	43	Yadi regarding certificate issued to Virji Natha.
19.	45	Certificate issued by Madhura Hospital of injured Mukesh Hargovindbhai.
20.	46	Certificate issued by Madhura Hospital of injured Rasikbhai Vitthalbhai.
21.	47	Yadi regarding issue of certificate of injuries and treatment.
22.	50, 51	Certificate regarding further treatment to both the injured persons.
23.	54	Original complaint of complainant.
24.	58	Arrest Panchnama of accused Himmat Desha.
25.	60	Report of taking complaint.

Sr. No.	Exh. No.	Type of Evidence
26.	61	Order regarding investigating of offence given.
27.	63	Copy of Janvajog Entry No. 190/01.
28.	64	Copy of order of investigation of Janvajog Entry No. 190/1.
29.	66	Seizure Panchnama of Bajaj Motorcycle.
30.	67	Panchnama of physical status of injured Rasikbhai.
31.	68	Yadi for getting injuries Certificate.

10. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Gondal explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement, as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution in its entirety and submitted that they have been falsely implicated in the offence alleged against them. However, they did not lead any evidence nor did they examine any witness in support of their defence.

11. On appreciation, evaluation, analysis and scrutiny of the evidence, the learned Additional Sessions Judge, Gondal came to the conclusion that the accused have committed an offence punishable under Section 395 & 397 of IPC. On the basis of the said finding, the learned Additional Sessions Judge, Gondal has sentenced them to suffer RI for 07 years and fine of Rs.500/- and in default thereof, to undergo RI for 3 months for the offence punishable under Section 395 of IPC and RI for 7 years with fine of Rs. 500/- and in default thereof, to undergo RI for 3 months for the offence punishable under Section 397 of the IPC. Since the State is aggrieved by and dissatisfied with the order of sentence imposed by the learned Additional Sessions Judge, Gondal, the present appeal is filed under Section 377 of the Code for enhancement of the sentence.

12. This appeal was admitted by the Learned Single Judge (Coram :- D. N. Patel, J.) of this Court on 02.09.2006. While admitting the appeal, the Court

has observed that having heard the learned Additional Public Prosecutor for the appellant - State and looking to the nature of judgment delivered by the Trial Court and evidence on record, appeal was admitted. The Court has also directed the Registry to get the paper-book of Criminal Appeal prepared so as to reach this Court on or before 30.11.2006 and to enlist this Criminal Appeal on final hearing board on 08.12.2006. After preparation of the paper-book, the appeal is listed before us for final hearing.

13. Before we proceed to deal with this appeal, it is important to take note of the fact that the respondents herein - original accused have also preferred appeal before this Court being Criminal Appeal No. 638 of 2004 challenging their conviction and sentence under Section 395 & 397 of IPC. This Court (Coram :- Akil A. Kureshi, J.) has dismissed the said appeal vide order dated 07-10-12.04.2006.

14.Mrs. Falguni Patel, learned Additional Public Prosecutor appearing for the appellant - State of Gujarat has submitted that the order of sentence is undoubtedly lenient and grossly inadequate. The learned Additional Sessions Judge, Gondal after arriving at the conclusion that the prosecution has established the guilt of the accused persons without shadow of doubt and that the case is of serious nature and it affects the social fabric of the society, if the guilty persons are not punished severely, has imposed only the minimum sentence of R.I. of 07 years both under Sections 395 & 397 of IPC, though the sentence prescribed therein is of life imprisonment. The learned Additional Sessions Judge, Gondal after believing the testimony of the prosecution witnesses positively and after concluding that the accused persons have committed heinous offence of dacoity, should not have inflicted inadequate sentence. The sentence is, therefore, required to be enhanced looking to the facts and circumstances of the case. She has further submitted that the punishment for the offence under

Section 395 is imprisonment upto 10 years where involvement of the accused persons are proved in dacoity with corroborating evidence. In that case, 10 years imprisonment is required to be inflicted under Section 397 of IPC. The learned Additional Sessions Judge, Gondal ought to have appreciated that the charges against the accused persons are proved and if death or grievous hurt is caused to the victim by using deadly weapons while committing robbery or dacoity, offender shall not be punished for R.I. for 7 years only. She has, therefore, submitted that the learned Additional Sessions Judge, Gondal should have appreciated the provisions of law and should not have inflicted minimum sentence to the accused persons who are found to have indulged in a very heinous crime in the society.

15.Mr. Vilas G. Goswamy, learned advocate appointed through High Court Legal Aid Committee to represent the respondents - original accused has

submitted that the learned Additional Sessions Judge, Gondal has considered the facts and circumstances of the case and appreciated the evidence on record and inflicted the sentence of seven years for the offences punishable under Sections 395 & 397 of IPC and he has given detailed reasons as to why minimum sentence of 07 years is inflicted on the respondents – original accused. He has, therefore, submitted that there is no case for enhancement of sentence and appeal filed by the State is required to be dismissed.

16. We have considered the submissions advanced by the learned advocates appearing for the parties at length and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to

the judgment and order passed by the learned Additional Sessions Judge, Gondal convicting the accused for commission of the offence punishable under Section 395 & 397 of IPC and sentencing them to suffer RI for 07 years and fine of Rs.500/- and in default thereof, to undergo RI for 3 months for the offence punishable under Section 395 of IPC and RI for 07 years and fine of Rs. 500/- and in default thereof, RI for 3 months for the offence punishable under Section 397 of the IPC.

17.In order to find out whether the prosecution has established the charge against the accused beyond reasonable doubt and whether the learned Additional Sessions Judge, Gondal has recorded a just and correct conclusion holding the respondents - accused guilty and imposing the sentence as indicated above, we have minutely examined the oral as well as documentary evidence. We have also gone through the judgment and order passed by the learned Single Judge of this Court while dismissing

the appeal filed by the respondents - accused challenging their conviction. The Learned Single Judge has also enumerated certain factors and observed that no muddamal was found from the accused persons and that there was delay in holding the test identification parade in case of accused No.1 i.e. Himat Desabhai Devipujak. The Learned Single Judge has further observed that the incident has taken place at the middle of the night and there was time gap between the incident and the recording of the witnesses before the Court. On the basis of these factors, the respondents - original accused though claimed acquittal in the said appeal and though the acquittal is not justified, these grounds are very much important for the purpose of considering the appeal filed by the State of Gujarat for enhancement of the sentence. As far as appeal under Section 377 is concerned, the Court is very slow to enhance the sentence unless there is some glaring error and the learned Trial Judge has not correctly appreciated the evidence on record. We do not find any such error or infirmity in the impugned

judgment and order of the learned Additional Sessions Judge, Gondal while convicting the respondents - original accused and imposing sentence of RI for seven years for each the offences punishable under Section 395 & 397 of IPC.

18. In view of the aforesaid discussion, according to us, there is no manner of doubt that the learned Additional Sessions Judge has correctly imposed the sentence of 7 years each for commission of the offence punishable under Section 395 & 397 of IPC. On having close scrutiny of the evidence on record, we find no infirmity in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the learned Additional Sessions Judge, Gondal. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence as according to us, no other conclusion is possible except the one reached by the learned Additional Sessions Judge, Gondal on the facts and in

the circumstances of the case.

19.No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the learned Additional Sessions Judge, Gondal is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it right to invest more time in reiterating the same reasoning in our language or giving the same answers to the same criticism in our own words for the sake of brevity.

20.In the aforesaid view of the matter, according to us, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Gondal.

21.On the wake up of the aforesaid, we are not inclined

to interfere with the judgment and order of conviction and sentence recorded by the learned Additional Sessions Judge, Gondal and hence, this Appeal lacks merit, and deserves to be dismissed.

22.For the foregoing reasons, the Appeal fails and is accordingly dismissed.

[A. M. KAPADIA, J.]

[K. A. PUJ, J.]

Savariya